No. 91-1248

Supreme Court, U.S.
FILED
FEB 3 1992
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1991

WILLIAM E. NOWERS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

William E. Nowers
Pro se
10308 Confederate Lane
Fairfax, Virginia 22030
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Pro se

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QUESTION PRESENTED

Whether the right to a fair trial and due process under the Sixth and Fourteenth Amendments demands that a defendant charged with blocking an entrance to an abortion clinic be allowed a jury untainted by the State and be allowed to present evidence to the jury in support of his claim that his conduct was not unreasonable and was necessary to save a human life ?

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The parties to the criminal and appellate proceedings in the state courts were Petitioner, William E. Nowers, as Defendant in the Circuit Court of the City of Alexandria and Appellant in the Court of Appeals, and the Commonwealth of Virginia as Plaintiff in the Circuit Court of the City of Alexandria and Appellee in the Court of Appeals.

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No.

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1991

William E. Nowers

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE COMMONWEALTH OF VIRGINIA.

OPINIONS BELOW

The decision of the Virginia Supreme Court in denying a Petition for Rehearing is not reported and is printed in Appendix A.

The decision of the Virginia Supreme Court in refusing a Petition for Appeal is not reported and is printed in Appendix B.

The initial Unpublished Memorandum Opinion of the Virginia Court of Appeals is printed in Appendix C.

The revised Unpublished Memorandum Opinion of the Virginia Court of Appeals with covering letter is printed in Appendix D.

The denial by the Virginia Court of Appeals of a Petition for Rehearing is not reported and is printed in Appendix E.

The denial by the Virginia Court of Appeals of a request for a new hearing is not reported and is printed in Appendix F.

The Order of the Court of Appeals affirming the judgment appealled from is not reported and is printed in Appendix G.

The order of the Circuit Court for the City of Alexandria in finding the Petitioner guilty and passing sentence is not reported and is printed in Appendix H.

JURISDICTION

Petitioner has exhausted all appeals in the courts of the Commonwealth of Virginia with the denial by the Virginia Supreme Court on November 8, 1991 of a request for a Rehearing as set forth in Appendix A.

The Virginia Court of Appeals had previously affirmed a judgment of conviction entered against William E. Nowers, Petitioner in this case through an Unpublished Memorandum Opinion dated April 2, 1991. At his trial Petitioner was prevented from introducing any evidence in support of his claim that his actions were necessary to save human life. Petitioner was also denied an unbiased jury and was denied due process of law both at the trial and appellate courts as guaranteed by both the Sixth and

Fourteenth Amendments. Following conviction, appeals were timely made to the Virginia Court of Appeals and to the Virginia Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (a).

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

U.S. CONSTITUTION, AMENDMENT VI:

....In all criminal prosecutions, The accused shall enjoy the right to a speedy and public trial, by an impartial jury".

U.S.CONSITUTION AMENDMENT XIV Section 1

...Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

VIRGINIA CONSTITUTION, ARTICLE 1 Para 8:

That in criminal prosecutions a man hath a right to...a...trial by an impartial jury...

VIRGINIA CODE SECTION 18.2-404:

Any person or persons who in any public place or on any private property open to the public unreasonably or unnecessarily obstructs the free passage of others... shall be guilty of a Class 1 misdemeanor.

STATEMENT OF THE CASE

This is a Petition for Certiorari from the afffirmance by the Court of Appeals of Virginia of conviction entered in favor of the Circuit Court of the City of Alexandria against William E. Nowers on October 31, 1989 in the Circuit Court for the City of Alexandria, docket number CM 890283.

On March 24, 1989 William E. Nowers was arrested at an abortion clinic along with others and charged with trespassing which charge was amended before trial to one of unreasonably obstructing the free passage of other persons in violation of Section 18.2-404, Code of Virginia.

The Petitioner, William E. Nowers, chose to act pro se and a jury trial was had before the honorable Alfred D. Swersky in the Circuit Court of the city of Alexandria on October 31, 1989. During voir dire the Petitioner questioned the veniremen and unsuccessfully challenged all for cause of being biased by the Commonwealth through a booklet given to them which strongly implied they must follow the judge's orders on the law and could only rule on the facts. (Circuit Court of the City of Alexandria Trial

Transcript Case no. 890783, p 19, hereinafter "Tr") Petitioner objected on grounds of previous rulings of this Court and on our common law itself that gives the jury the supreme right to rule as their conscience sees fit. Petitioner referred the Court (Tr.8) to Georgia v. Brailsford, 3 U.S.(Dall) 1,1L.Ed.483 (1794) where the first Chief Justice John Jay wrote:

> It is presumed that jurors are the best judges of fact. It is presumed that the courts are the best judges of the law. But still both objects are within your, the jurors decision. You have a right to take it upon yourselves to judge both the law as well as the fact in controversy.

Petitioner continued his objections to a biased jury in his appeal to the higher courts.

During the trial, as a preliminary matter, the Commonwealth submitted a Motion in Limine to exclude certain

evidence as to fetal life and the defense of necessity. The Court granted the motion over the objections of the Petitioner and ruled there would be no testimony as to the status of the fetus or when life begins. Petitioner objected on grounds of being denied Sixth Amendment rights to present evidence in his own defense and stated to the Court, "A judge is essentially trying me when my main evidence is denied to the jury."

A timely appeal was made to the Virginia Court of Appeals claiming a violation of the Petitioner's right to present evidence in his own defense and his right to an unbiased jury. The Court of Appeals affirmed the conviction in an unpublished Memorandum Opinion dated April 2, 1991. (See App C) A Petition for Rehearing was submitted based on the Appeals Court's affirmation

of conviction based on the wrong charge and other inconsistencies. The Petition for Rehearing along with a later Notice of Appeal was denied by the Court of Appeals. However a second Memorandum Opinion was issued bearing the same date as the first but changing the incorrect charge and other implied wording to read correctly. A Petition for Appeal to the Virginia Supreme Court was denied and a Petition for a Rehearing was denied on November 8, 1991. (See App. A)

The denial of due process is shown in many individual actions at both the trial and appellate level and although each individual action may not in itself be extreme, the compilation of all as a whole provides a clear picture of denial of due process. Just as a series of individual acts each by itself may not be discriminatory the pattern of all as a

whole might show clear discrimination. To sum up the actions questioned:

1. The jury was briefed in advance by the state through a booklet on jury duty that stated they must follow the judge's ruling on the law. (Tr p.19)

2. The Court denied all evidence relating to fetal life and expert witness testimony as to when life begins.(Tr p29)

3. The Court stated life beginning at conception was a theory and denied Petitioner's evidence to support this as medical fact. (Tr. p29)

4. The Court specifically denied evidence to show abortions were scheduled on that specific date, March 24, 1989, and the Court of Appeals denied the necessity defense solely because this evidence was not presented.(Tr p58;App C)

5. The Court's instructions to the

jury included asking the jurors to determine or rule on each individual element and if they found each element had been proved they must find the Petitioner guilty of the charge.

6. The Court of Appeals denied three times Petitioner's request for a pro se oral presentation. None was had.

7. The Court of Appeals denied Petitioner's motion on March 6, 1991 to waive part of Rule 5A:12 and permit questions not included in the Petition for Appeal to be considered. These questions were clearly a constitutional issue in the trial, were ruled on by the Court and objected to by the Petitioner. They were omitted only in the Petition for Appeal due to an uncooperative attorney and without the Petitioner's prior knowledge or approval.

8. The Court of Appeals initially affiirmed the guilty finding based on the wrong charge. (App.C)

9. The Court of Appeals denied a rehearing even though a pro se oral pesentation had been denied three times, their opinion was based on the wrong charge and other discrepancies. (App E)

ARGUMENT I

THE RIGHT OF EACH AND EVERY CRIMINAL DEFENDANT TO A REASONABLE OPPORTUNITY TO BE HEARD AND PRESENT A COMPLETE DEFENSE TO A JURY IS A FUNDAMENTAL RIGHT IN THE AMERICAN SYSTEM OF JURISPRUDENCE.

While this case involves the blocking of an abortion clinic, the question of fetal life, and the Roe v. Wade decision, this Court is not asked to rule on abortion but on the denial to the Petitioner of a fair tral and the opportunity to present evidence in his own defense. An underlying question is, does the trial judge in a jury trial have unlimited authority to decide critical issues of evidence that effectively deny a defendant the right to present a proper defense?

Specifically all evidence of fetal

life and the necessity defense was denied to the jury. The Court further went on record to state life beginning at conception was a theory (Tr p29) and denied evidence from an expert witness to prove it was a medical fact. As a matter of fact and not law it was proper evidence for a jury to decide.

It is a well established fact in American Jurisprudence that a defendant in a criminal case has the right to be heard, to have his day in court and to present evidence in his own defense. The argument here is not to support the obvious above but to show in this case the trial Court and the Appeals Court deviated so far from the above rights as to constitute a clear violation of the Petitioner's right to a fair trial under

the Sixth and Fourteenth Amendments.

The Court's granting of the Motion in Limine denying evidence of fetal life and later ruling prohibiting the necessity defense stripped Petitioner of his constitutional right to present evidence in his own defense. In denying the necessity defense the Court referred to Buckley v. City of Falls Church, 371 S.E. 2d 827 (1988). See also United States v. Bailey, 444 U.S. 394, 410 (1980). Buckley stated the essential elements of the necessity defense are: (1) that the defendants must have reasonably believed that their action was necessary to avoid an imminent threatened harm. (2) that there were no other adequate means except those which were employed to avoid the threatened harm. And (3) that a direct causal relationship may be reasonably anticipated between the action taken and

the avoidance of the harm. The Petitioner concurred with the application of these elements in the Buckley case which was a trespassing case to hand out literature. However as claimed by the Petitioner in Court (Tr p32):

> This Buckley case does not fit into what I (Petitioner) am being charged with. And so the denying of the necessity defense here is not the same as in the Buckley case.

Blocking an entrance does meet all three of the requirements for the necessity defense as identified in the Buckley case. (1) The Petitioner reasonably believed his actions were necessary to avoid an imminent threatened harm. (2) There were no other adequate means except those which were employed to avoid the threatened harm. and (3) A direct causal relationship was reasonably anticipated. No babies were killed at the clinic while

the blocking was in progress.

The disturbing part of this case is the Court's eagerness to accept a collectivist concept that since the necessity defense was denied in the Buckley case it is therefore denied in this a different but somewhat similar case. This concept effectively denies to each defendant his own trial and he is found guilty by the judge through association with a previous somewhat similar case even though the charge is different.

The eagerness of the Court to deny all evidence relating to the necessity defense completely obscured the fact that Buckley was a simple trespass case (to hand out literature) while the Petitioner was charged with blocking an entrance to save a baby's life. A major difference in the physical act and in the charge since blocking also includes the elements

of "unreasonably" or "Unnecessarily". Whenever the reasonableness of an act is in issue then the evidence must necessarily go beyond the mere physical act in question to include background information as to the cause of the act and the consequences had the act not been commit ted. Whether an accused's actions were unreasonable or not may depend on the specific situation, community standards and other factors which can only legitimately be ruled on by the jury.

The error of charging the Petitioner with blocking while essentially attempting to prove a simple trespass was continued through the Court of Appeals. The Court of Appeals in an unpublished Memorandum Opinion dated April 2, 1991 (App. C) affirmed the conviction of trespass while the trial and conviction was on a

charge of blocking an entrance. This was no accidental nor typographical error since the Memorandum Opinion also made reference to "...defense against trespass".

In addition to the error of affirming the conviction on the wrong charge the Court of Appeals actually implied that evidence denied to the jury by the court was critical when it stated(App C):

> The record before us shows that Nowers(Petitioner) failed to present any evidence that abortions were scheduled to take place on October 24, 1989. Without such evidence establishing an imminent threatened harm the defense of necessity cannot be raised.

The trial transcript however clearly shows (Tr p58) that the Petitioner was stopped by the Court from questioning a witness, Penny Smith administrator of the abortion clinic, when his stated purpose was, "...to establish the fact that

abortions were being conducted in the clinic on that day."

The Petitioner represented himself at the jury trial. An attorney was authorized to represent Petitioner in the appeal process since Petitioner was unfamiliar with the administrative procedure. The attorney prepared the initial appeal document, the Petition for Appeal,on the last possible day and without the Petitioners knowledge or consent had deleted most of the Petitioners constitutional issues he had so strongly argued for that it elicited a warning from the judge of possible contempt.(Tr 31) Two motions were submitted to the Appeals Court along with an oral request at the oral hearing to permit Petitioner to proceed pro se. All re-

quests were denied and there was no oral hearing. While a defendant is normally bound by his attorney's actions, an attorney has no right to do any act which surrenders a basic constitutional right of the client. These rights were clearly brought out in open court, The Trial Court Judge ruled on them and the objections were noted.

In a separate motion submitted to the Court of Appeals on March 6, 1991, Petitioner requested that the requirement that only questions raised in the Petition for Appeal would be noticed, be waived. The attorney had arbitrarily and without any prior indication to Petitioner discarded arguments made in open court concerning the right to an impartial jury, the jury being intimidated by the Commonwealth, the denial of the right to present evidence in his own

defense and the improper charge to the jury indicating under certain conditions they must find the defendant guilty. These are no mere technicalities but basic constitutional issues brought out, ruled on and objected to at the trial court level.

A letter was filed with the Court of Appeals on March 13, 1991 requesting a new hearing based on the denial of a pro se oral hearing. The request was denied on April 2, 1991. (App. F) A Petition for Rehearing based on the discrepancies and errors in the Memorandum Opinion identified above was denied by the Court of Appeals on May 22, 1991.(App E.) However on that same date The Court of Appeals issued a second unpublished Memorandum Opinion bearing the same date as the original (April 2, 1991) but changing the

charge to read correctly and deleting the reference to defense against trespass.

The Petitioner challenged at the trial court and at the Court of Appeals the supremacy of the Roe v. Wade decision by this Court in this case since Roe specifically stated, "We can not say when life begins." Petitioner was prepared to show through expert medical witness testimony that a new human life begins at conception thus going beyond Roe.(Tr. p9) The question here again for this Court is not to determine the fact of when a new human life begins but to question the denial of this evidence to the jury as a violation of Petitioner's constitutional right to present evidence in his own defense.

ARGUMENT II

THE RIGHT OF A CRIMINAL DEFENDANT TO A TRIAL BY A JURY UNBIASED OR INFLUENCED BY THE GOVERNMENT AS WELL AS THE RIGHT TO A GENERAL VERDICT IS A FUNDAMENTAL RIGHT IN AMERICAN JURISPRUDENCE.

The purpose of the Sixth Amendment's guarantee of a criminal defendant's right to a jury trial as stated by this Court in Apodaca v. Oregon 92 S.Ct 1628 (1972) is:

> To prevent oppression by the government by providing a safeguard against the corrupt or overzealous prosecutor and against compliant, biased, or eccentric judge...

Prior to voir dire Petitioner requested the Court to read the following statement to the jury:

> Members of the jury, you are advised that the booklet Handbook for Jurors may be misleading in that it implies the jury must follow the

> judge's instruction on the law. While it is normally recognized that the jury is the best judge of facts, while the judge is the best judge of the law, still it is within the rights of the jury to rule on both the facts of the case and the law.

The Court denied the request and noted the objection.(Tr p13)

During voir dire Petitioner determined that all prospective jury members had read the handbook for jurors provided by the Commonwealth and challenged all for cause since they had essentially been instructed by the government that they could only rule on the facts of the case and they must follow the Court's instruction on the law. Article 1, para 8 of the Constitution of Virginia and the Sixth Amendment to the Constitution both guarantee that in criminal prosecutions a man hath a right to a trial by an impartial jury. Also in Martin v. Common-

wealth, 221 Va. 436. 271 S.E.2d 123 (1980):

> The Constitutional and statutory guarantee of an impartial jury is no mere legal technicality but a substantive right scrupulously to be observed in the day to day administration of justice.

There are many cases that specifically address the issue of juror's rights to rule on facts only or facts and law. One of the earliest and probably the clearest ruling to date was in 1794 when the first Chief Justice of this Court, John Jay wrote in Georgia v. Brailsford, 3 U.S.(3Dall) 1.1 L.Ed.483 (1794):

> It is... presumed that the juries are the best judge of fact; it is presumed that the courts are the best judges of law. But still both objects are within your (the jury's) decision. You have a right to judge both the law as well as the fact in controversy.

Also Oliver Wendell Holmes stated in Horning v. D.C., 254 U.S. 135 (1920):

> ...the jury has the power to bring in a verdict in the teeth of both law and facts.

Also in U.S.v. Moylan 417 F.2d 10021 (1969):

> The jury has the undisputed power to acquit even if its verdict is contrary to the law as given by the judge and contrary to the evidence.

It is submitted that the judge has the right and duty to instruct the jury on the law. However once the judge has instructed the jury on the law it is the jury's duty to apply the law to the facts. See U.S. v. Johnson 718 F.2d 1317 (1983) which said:

> We hold that although it is the Court's duty to instruct the jury on the legal principles applicable to the determination of that question, it is the jury's exclusive province to apply the law to the facts and determine whether the document is a security...
>
> So while it is true that it is the judge's duty to instruct the jury on the law, it is not true that juror's decide only the facts, because jurors are always judges of the law in the sense that jurors must pass

> on the manner and extent in which the law expounded by the judge fits the facts brought out in the evidence. id at 1318

In the case of U.S. v. Dougherty 473 F.2d 1113 (1972) the United States Court of Appeals stated:

> the jury has an unreviewable and irreversible power... to acquit in disregard of the instructions on the law given by the trial judge...jurors informally know about their ability to nullify the law and will do so when circumstances warrant it but specific instructions about nullifying power would cause the jury to operate in a radically different way.

However in the present case the Court went far beyond this. The Commonwealth first implied to the jurors, through the Handbook for Jurors, that they did not have the right to rule on the law; secondly, the Court refused Petitioner the right to correct this through a statement to the prospective

jurors prior to voir dire. Thirdly the Court ordered the Petitioner not to use the words "jury nullification", which is a completely legal concept and fourth, in open court the Court stated, "the jury is bound to follow the instructions as to the law given them by the Court."(Tr p28) The present case goes far beyond the simple refusal to instruct jury members as to their rights - to the point of refusing to let Petitioner present evidence in his defense and even to where the Court erroneously stated to the jury they must follow the instructions given by the Court.

A special verdict is the de facto result of a judge's order to the jury that they must rule only on the facts. According to State v. Beavers 364 So 2d 1004:

> special verdicts impair or wholly abrogate Defendant's rights to a general verdict which is an important element of constitutional right to a jury trial.

As further cited in U.S. v. Spock

416 F.2d 165,169 (1969):

> Put simply the right to be tried by a jury of ones peers finally extracted from the King would be meaningless if the Kings judge's could call the turn...Bushells case 124 Eng Rep. 1006 (C.P.)...In the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure...

Although the Court used a standard model jury instruction Petitioner objected to the strong implication to the jury that if they found certain conditions to be true then they must find the defendant guilty of the charge. In the Spock case the jury was given a list of interrogatories to answer before arriving at a decision. While the answers were not recorded or reported to the Court, the

mere asking of the questions of the jury might be said:

> to infringe on its power to follow or not follow the instructions of the Court. Moreover, any abridgement or modification of this institution would partly restrict its historic function, that of tempering rules of law by common sense brought to bear on the facts of a specific case.

Also in Spock it was made clear that the jury must not only be free from direct control in its verdict but also free from judicial pressure and:

> in a criminal case the Court may not order the jury to return a verdict of guilty no matter how overwhelming the evidence of guilt.

In the present case the Model Instruction to the jury parallels the Spock case very closely. However in Spock the Court placed no direct linkage on the questions asked and the juror's verdict but it was ruled the mere asking of the questions was undue interference. The Court in

this case is even more intimidating since the instruction states in brief, "if you find...beyond a reasonable doubt... then you shall find the Defendant guilty." Thus the Court has placed an intolerable linkage on the jurors determination of the elements of the case and a requirement for a finding of guilty on the charge. Also the Court stated in U.S. v. Wilson 629 F.2d 439 (1980):

> In criminal cases, jury is entitled to acquit Defendant because it has no sympathy for government's position; it has general veto power...

CONCLUSION

For the reasons and per authorities cited, this Petition for a Writ of Certiorari should be granted. The Court should review the issues of whether Petitioner was unconstitutionally deprived of a meaningful opportunity to present evidence in his own defense and was denied an unbiased jury.

Respectfully submitted

William E. Nowers

pro se

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 8th day of November, 1991.

William E. Nowers, Appellant,

against Record No. 911061

Court of Appeals No. 1834-89-4

Commonwealth of Virginia

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of September, 1991 and grant a rehearing thereof, the prayer of the said petition is denied.

A copy,

Teste:

Clerk

VIRGINIA

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 9th day of September, 1991.

William E. Nowers Appellant,

against Record No. 911061

Court of Appeals No. 1834-89-4

Commonwealth of Virginia Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this cas and consideration of the argument submitted in support of the granting of an appel, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach,Clerk

By: Deputy Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Cole, Keenan and Willis

Argued at Alexandria, Virginia

WILLIAM NOWERS, S/K/A WILLIAM E.NOWERS

v. Record No. 1834-89-4

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY

JUDGE BARBARA M. KEENAN

April 2, 1991

FROM THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA Alfred D. Swersky, Judge

James D. Young for appellant.

Thomas C. Daniel, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

William E. Nowers was convicted by a jury of trespass. In this appeal, we address two issues: 1) whether the trial

*Pursuant to Code Para 17-116.010 this opinion is not designated for publication

court erred in granting the Commonwealth's motion in limine, thus denying Mr. Nowers the defense of necessity; and 2) whether the trial court's action granting the motion in limine improperly denied Nowers the opportunity to raise the defense of good faith belief that he was obeying the law. For the reasons that follow, we affirm the decision of the trial court. We do not address the remaining issues raised by Mr. Nowers in his brief as they were not presented in his petition for appeal. Rule 5A:12.

First we find that the defense of necessity was not otherwise available to Nowers under the evidence presented. The record before us shows that Nowers failed to present any evidence that abortions were scheduled to take place on

October 24, 1989. Without such evidence establishing an imminent threatened harm, the defense of necessity cannot be raised. See Buckley v. City of Falls Church, 7 Va. App. 32,33, 371 S.E.2d 827, 828 (1988) (citing United States v. Cassidy, 616 F.2d 101, 102 (4th Cir. 1979). Thus, we conclude that the trial court's ruling granting the motion in limine did not prejudice Nowers' ability to raise that defense.

We also find that, on the record before us, Nowers was not entitled to raise the defense of good faith belief that he was obeying the law. In order to constitute a valid defense to trespass, a good faith belief or claim of right must be based on proof of authorization. Reed v. Commonwealth, 6 Va.App. 65, 71, 366 S.E.2d 274, 277 (1988). Here, however, there was no evidence presented that

Nowers was authorized by agreement or conduct, on the part of the owners or lessee of the premises in question, to block the passage of individuals into the facility. Therefore, we find that the trial court's decision to grant the motion in limine did not prejudice Nowers' ability to raise this defense.

For the reasons stated, we affirm Nowers conviction.

Affirmed.

D-1

MEMORANDUM

To: All Parties Receiving Court of Appeals Unpublished Opinions

From: Cynthia L. McCoy

Date: May 21,1991

RE: William Nowers, s/k/a, etc.
v. Commonwealth of Virginia
Record No. 1834-89-4

Enclosed is a revised copy of the opinion rendered by the court in the above-referenced case. You will note that the first sentence of the opinion and the first sentence of the second paragraph on page 2 have been amended.

cc: Hon. William D. Swersky
James D. Young, Esq.
Hon. Thomas C. Daniel
Mr. William E. Nowers

COURT OF APPEALS OF VIRGINIA

Judges Cole, Keenan and Willis

Argued at Alexandria, Virginia

WILLIAM NOWERS, S/K/A WILLIAM E. NOWERS

v. Record No. 1834-89-4

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY

JUDGE BARBARA M. KEENAN

April 2, 1991

FROM THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA Alfred D. Swersky, Judge

James D. Young, for appellant.

Thomas C. Daniel, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

William E. Nowers was convicted by a jury of obstructing free passage in violation of Code para 18.2-404. In this

*Pursuant to Code para 17-116.010 this opinion is not designated for publication

appeal, we address two issues: 1) whether the trial court erred in granting the Commonwealth's motion in limine, thus denying Nowers the defense of necessity; and 2) whether the trial court's action granting the motion in limine improperly denied Nowers the opportunity to raise the defense of good faith belief that he was obeying the law. For the reasons that follow, we affirm the decision of the trial court. We do not address the remaining issues raised by Nowers in his brief as they were not presented in his petition for appeal. Rule 5A:12.

First, we find that the defense of necessity was not otherwise available to Nowers under the evidence presented. The record before us shows that Nowers failed to present any evidence that abortions were scheduled to take place on October

24, 1989. Without such evidence establishing an imminent threatened harm, the defense of necessity cannot be raised. See Buckley v. City of Falls Church, 7 Va. App.32,33, 371 S.E.2d 827,828 (1988) citing United States v. Casidy, 616 F.2d 101, 102 (4th Cir. 1979). Thus, we conclude that the trial court's ruling granting the motion in limine did not prejudice Nower's ability to raise that defense.

We also find that on the record before us, Nowers was not entitled to raise the defense of good faith belief that he was obeying the law. In order to constitute a valid defense, a good faith belief or claim of right must be based on proof of authorization. See Reed v. Commonwealth, 6 Va.App.65, 71,366 S.E.2d 274,277 (1988). Here, however there was no evidence presented that Nowers was

authorized by agreement or conduct, on the part of the owners or lessee of the premises in question, to block the passage of individuals into the facility. Therefore, we find that the trial court's decision to grant the motion in limine did not prejudice Nowers' ability to raise this defense.

For the reasons stated, we affirm Nowers' conviction.

Affirmed.

VIRGINIA:

In the Court of Appeals of Virginia on Wednesday the 22nd day of May, 1991.

William Nowers, s/k/a William E. Nowers Appellant,

against Record No. 1834-89-4

Circuit Court No. CM890283

Commomwealth of Virginia Appellee.

Upon a Petition for Rehearing

Before Judges Keenan, Cole* and Willis

On consideration of the pro se petition of the appellant to set aside the judgment rendered herein on the 2nd day of April, 1991 and grant a rehearing thereof, the said petition is denied.

* Judge Cole participated in the consideration and decision of this case prior to the effective date of his re-

tirement on April 30, 1991 and thereafter by designation pursuant to Code Sec. 17-116.01

A Copy,

Teste:

Patricia G. Davis, Clerk

By (Cynthia L. McCoy)

Deputy Clerk

VIRGINIA

In the Court of Appeals of Vrginia on Tuesday the 2nd day of April, 1991.

William Nowers Appellant

against Record No. 1834-89-4

Circuit Court No. CM 890283

Commonwealth of Virginia, Appellee

Upon an appeal from a judgment rendered by the Circuit Court of the City of Alexandria.

Before Judges Keenan, Cole and Willis

On March 14, 1991 came the appellant, in proper person, and filed a letter in which he requested that a new hearing be scheduled in this case.

Upon consideration whereof, the said request is denied.

A Copy, Teste: Patricia G. Davis Clerk

Deputy Clerk By; (Cynthia L. McCoy)

VIRGINIA

In the Court of Appeals of Virgnia on Tuesday the 2nd day of April, 1991.

William Nowers, s/k/a William E. Nowers

Appellant

against Record No.1834-89-4

Circuit Court No. CM 890283

Commonwealth of Virginia

Appelleee

Upon an appeal from a judgment rendered by The Circuit Court of The City of Alexandria.

Before judges Keenan, Cole and Willis

For reasons stated in writing and filed with the record, the court is of the opinion that there is no error in the

jydgment appealled from. Accordingly, the judgment is affirmed.

This order shall be certified to the trial court.

A Copy,

Teste:

Patricia G. Davis, Clerk

By (Cynthia L. McCoy)

Deputy Clerk

Appellee's Costs:

Attorney's fee $50.00

Appellee's brief $19.80

Teste: Patricia G. Davis, Clerk

By: (Cynthia L. McCoy)

Deputy Clerk

H-1

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA

v

WILLIAM NOWERS CM890283

ORDER

This day came the Attorney for the Commonwealth and the defendant, WILLIAM NOWERS (dob 092625), who stands charged in an amended warrant with obstructing free passage, appeared in Court in person. And the defendant, having been advised by the Court of his right to representation by counsel, waived his right to appointment of counsel.

Whereupon, the accused was arraigned pleaded NOT GUILTY to obstructing free passage as charged in the amended warrant, which plea was tendered by the

Accused in person.

The Court then impanelled thirteen qualified jurors, free from exception for the trial of the defendant, in the manner provided by law. Whereupon, the Attorney for the Commonwealth and the defendant each alternately exercised their rights to strike the names of three veniremen from the panel, as provided by law, and the remaining seven jurors, constituting the jury for the trial of the defendant, were duly sworn.

After opening statements, the Court and jury heard the evidence presented by the Commonwealth and the defendant.

After hearing the evidence, the instructions of the Court and argument of counsel, the jurors were went to the jury room to consider their verdict. They

subsequently returned their verdict in open court, in the following words:

"We, the Jury, find the defendant, WILLIAM NOWERS, GUILTY of unreasonably obstruct free passage as charged in the warrant and fix his punishment at 30 days in jail and $500.00 fine."

Date: 10/31/89 Foreman: Sidney Burke II

Thereupon, the jury was discharged.

The Court then asked the defendant whether he desired to make a statement or to advance any reason why judgment should not be pronounced against him. The Court having heard and considered the defendant's statement, finds the defendant GUILTY of obstructing free passage as charged in the amended warrant and sentences the defendant to confinement in

the Alexandria City Jail for thirty (30) days and payment of a fine in the amount of $500.00.

It is further ordered that the defendant pay the costs of prosecution.

The Court orders that the defendant be allowed credit for the time spent in in jail awaiting trial.

After pronouncing sentence, the Court advised the defendant of his right to appeal his conviction and sentence and of his right to court appointed counsel to represent him upon his appeal if indigent, and the Court also informed the defendant that his notice of appeal must be filed with the Clerk of this Court within thirty (30) days from the date hereof.

IT IS FURTHER ORDERED that the defendant shall be continued on bond

until the 30th day of November, 1989 pending appeal of this matter.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably represented the defendant.

And the defendant is allowed to depart.

Alfred D. Swersky, Judge

Entered: October 31, 1989